Supreme Court US
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No 09-447

IN THE
Supreme Court of the United States

DENNIS HECKER, *et al*,

Petitioners,

v

DEERE & COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly dismissed petitioners' breach of fiduciary duty claims based on allegations of "excessive" fees associated with the investment options offered in respondent's 401(k) retirement plans, where those options included a wide array of mutual funds and the "excessive fee" claims related entirely to allegedly improper "revenue sharing" between the mutual funds' investment advisor and the plans' trustee.

2. Whether the court of appeals correctly held that ERISA Section 404(c) provides an affirmative defense to a breach of fiduciary duty claim where, as here, the 401(k) plans include a sufficient range of investment options so that participants in the plan have control over the risk of loss, the total amount of fees paid was disclosed, and the only information allegedly not disclosed was information whose disclosure was not required under the governing DOL regulations.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, respondent states that it has no parent companies and that no publicly held company owns 10% or more of its stock.

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Respondent, Deere & Company ("Deere"), respectfully submits this opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners ask the Court to decide questions that were not presented in the courts below. The allegations in petitioners' complaint, amended complaint, and second amended complaint ("SAC") bear scant resemblance to the arguments petitioners now seek to advance in this Court. We begin, therefore, by correcting the misimpressions that petitioners have sought to create about what was argued and what was decided in the courts below.

A. The Plans.

Petitioners are participants in one of two participant-directed 401(k) plans – the John Deere Savings and Investment Plan ("SIP") and the John Deere Tax Deferred Savings Plan ("TDS Plan") (collectively, the "Plans"). Resp. App. 3a, 4a, 5a, SAC ¶¶ 10, 12-13, 16 Both Plans – functionally identical for purposes of this lawsuit – are "defined contribution plans" within the meaning of ERISA Section 3(34), 29 U S.C § 1002(34), that provide for an individual account for each participant. Resp App. 15a, SAC ¶ 30; R. 41 Ex. A, p. 218 [1]

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[1] References to "Resp. App __a" and "Pet. App __a" are to the Respondent's Appendix and Petitioners' Appendix, respectively. References to "R __" are to the district court record References to "A __" are to Plaintiffs-Appellants' [7th Cir.] Appendix, *Hecker v. Deere & Co.*, Nos. 07-3605 & 08-1224 (7th Cir. filed Mar. 7, 2009)

Deere is the Plans' Sponsor, the Plan Administrator, and a "named fiduciary," as those terms are defined by ERISA Section 3(16), 29 U.S.C. § 1002(16), and ERISA Section 402(a), 29 U.S.C. § 1102(a) Resp. App. 5a-6a, SAC ¶ 18; R. 41 Ex. A, p. 284; A. 282. Fidelity Management Trust Company ("FMTC") is the Trustee of the Plans. Resp. App. 6a, SAC ¶ 20; A. 46, 282. Fidelity Management & Research Company ("FMR") is an affiliate of FMTC that provides fund management services to Fidelity mutual funds, including the mutual fund investment options offered by the Plans Resp App. 7a, 17a, SAC ¶¶ 22, 36; A. 49-50.

As of December 31, 2006, the Plans offered participants twenty-nine primary investment funds. The Plans also provided access to more than 2,500 mutual funds from Fidelity and other companies through Fidelity's BrokerageLink service. R. 41 Ex. A, pp 214-17. Of the twenty-nine primary investment fund alternatives, twenty-six are retail mutual funds – the same mutual funds Fidelity offers to its non-plan customers. Resp. App. 17a, SAC ¶ 36. Both Plans allow participants to direct the Trustee to invest their individual and Company matching contributions in, and reallocate their contributions among, any one or more of the Plan's twenty-nine primary investment funds (and 2,500 BrokerageLink funds) in such proportions as they see fit R. 41 Ex. A, pp. 214, 218; A. 50.

B. Revenue Sharing Arrangements Between FMR And FMTC That Defray Plan Administration Costs.

FMTC is compensated for its trustee and other Plan services through revenue sharing arrangements with FMR based on the fund-level management fees participants pay to FMR Resp. App. 8a, SAC ¶ 23; A. 276. The Fidelity mutual funds at issue are "no-load" funds: neither the Plans nor participants pay sales charges on the purchase or redemption of shares. Fund-level management fees and other operating expenses are assessed in the same way for all of each fund's Plan and non-Plan shareholders. Management and other fees are expressed as "expense ratios" – that is, as an annualized percentage of a funds' total assets – in the prospectuses for each fund in accordance with SEC requirements. A. 276. They generate a pool of money that compensates FMR and its affiliates for the associated investment management and other services they provide to the funds. Consistent with a widely accepted industry practice, FMR and its affiliates may compensate, or "share" some of their own compensation with, affiliated or unaffiliated parties that perform sales or shareholder administrative services. This may include compensating FMTC for administrative services it provides to the plans and participants. Resp App. 8a, 28a, 29a, SAC ¶¶ 23, 70, 74.

FMTC's services to the Deere plans, paid for by these revenue sharing arrangements, include trustee and recordkeeping services, participant phone and web services, daily valuation services, in-kind processing, participant loan servicing, preparation of year-end tax

documents, and communications describing available investment options. Resp. App. 16a, 26a, SAC ¶¶ 34, 62; A. 61-63, 70, 107, 131-34, 136, 151, 282

C. Proceedings In The District Court To Challenge Fidelity's Revenue Sharing Arrangements.

On December 8, 2006, December 28, 2006, and March 5, 2007, respectively, petitioners filed an original, amended, and second amended complaint against Deere, FMTC, and FMR. R. 2, 3, 35; Resp. App. 1a. Insofar as it relates to Deere, the only remaining defendant, the 130-paragraph SAC, "distilled to the actual causes of action," Pet. App. 36a, alleges that Deere breached its fiduciary duties to the Plans in two ways: (1) by failing to disclose details about the otherwise fully-disclosed fund-level fees charged to participant accounts (specifically, the revenue sharing arrangement between FMR and FMTC), and (2) by imprudently designating as plan investment options Fidelity retail mutual funds that carry "excessive" fees as a result of these revenue sharing arrangements. Resp. App. 28a-33a, SAC ¶¶ 68-90. In addition, to overcome an anticipated defense under ERISA Section 404(c), petitioners alleged in the SAC that the Plans could not qualify for the Section 404(c) safe harbor solely because Deere did not disclose the revenue sharing arrangements to plan participants. Resp. App. 25a, 33a-34a, SAC ¶¶ 60, 91-94.

On June 21, 2007, the district court granted, with prejudice and costs, Deere's motion to dismiss. Pet. App. 48a. With respect to petitioners' failure to disclose claim, the district court concluded that, although "the revenue

sharing issue raised by plaintiffs' complaint is a matter of policy concern within the Department of Labor . . . present regulations do not require the disclosure of the information." Pet App. 41a. With respect to plaintiffs' revenue sharing-based excessive fees claim, the district court found that Deere provided participants with the fee information that ERISA regulations require, that fees for the primary plan investment options ranged from as low as .07% to just over 1%, and that "[t]he only possible conclusion is that to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments . . " Pet. App. 46a-47a. Therefore:

> Assuming for purposes of the present motion that defendants failed to satisfy their fiduciary obligation to consider expenses when selecting mutual fund investment options, they are nevertheless insulated from liability by the safe harbor provision [of ERISA Section 404(c)] because of the nature and breadth of funds made available to participants under the plans.

Pet. App. 47a.

D. Proceedings In The Court Of Appeals.

1. The Court of Appeals Rejects Petitioners' Revenue Sharing Arguments.

The court of appeals affirmed. Pet. App. 31a. Not surprisingly, the court focused on the arguments advanced by petitioners, and, as in the district court,

those arguments concentrated on Fidelity's revenue sharing arrangement. The court rejected petitioners' contention that ERISA required these arrangements to be disclosed. In the court's words, "[h]ow Fidelity Research [FMR] decided to allocate the monies it collected (and about which the participants were fully informed) was not, at the time of the events here, something that had to be disclosed." Pet. App. 18a. The court agreed with the district court's conclusion that "such [a revenue sharing] arrangement . . . violates no statute or regulation." Pet App. 17a. Rejecting petitioners' contention that Deere breached its fiduciary duty under ERISA Section 404(a) by selecting Fidelity mutual funds that carried "excessive" fees as a result of the revenue sharing arrangements between FMR and FMTC, the court held that the undisputed facts left "no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants." Pet. App 19a. Noting the "wide range of expense ratios" among the Fidelity mutual funds and the 2,500 other funds available through BrokerageLink, the court held that "no rational trier of fact could find, on the basis of the facts alleged in this Complaint, that Deere failed to satisfy [its] duty" to furnish an acceptable array of investment vehicles. *Id.* The court emphasized that the same funds were also offered to investors in the general public "so the expense ratios necessarily were set against the backdrop of market competition." *Id*

As to petitioners' contention that the Deere Plans failed to qualify for the Section 404(c) safe harbor, the court of appeals reviewed in detail the Department of Labor's implementing regulations, and concluded that those regulations describe in detail the expenses and

fees that must be disclosed. "The fee distribution by the management company post-collection is not one of those fees." Pet. App. 25a (citing 29 C.F.R. §§ 2550.404c-1(b)(2)(i)). Rejecting petitioners' "broadside attack" that the Section 404(c) defense has no applicability to a fiduciary's selection of investment options in the first instance, the court noted that,

> [e]ven if [Section 404(c)] does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of [Section 404(c)] and includes a sufficient range of options so that the participants have control over the risk of loss.

Pet. App. 26a. Emphasizing that the Plans offered investment options carrying fees ranging from .07% to 1%, the court concluded that "[a]ny allegation that these options did not provide the participants with a reasonable opportunity to accomplish the three goals outlined in the regulation, or control the risk of loss from fees, is implausible . . ." Pet. App. 27a.

The Secretary of Labor ("Secretary") submitted her views in an amicus brief to the Seventh Circuit. She expressly disagreed with petitioners' assertion that the funds selected by the Plans in this case were imprudent because they might surreptitiously support revenue sharing arrangements:

> This is not to say, however, that the Secretary agrees with plaintiffs' more sweeping

> suggestions that the fiduciaries of participant-directed plans must always, or even usually, disclose revenue sharing arrangements as a matter of general fiduciary principles. Indeed, we are skeptical that, absent any misrepresentations, ERISA's duties of prudence and loyalty would have required disclosure to plan participants of revenue sharing among Fidelity affiliates.

Am. Br of Sec'y of Labor, Elaine L. Chao, as Amicus Curiae in Supp. of Pls.-Appellants at 20, *Hecker v. Deere & Co.*, Nos. 07-3605 & 08-1224 (7th Cir. filed Apr. 4, 2008), *available at* http://www.dol.gov/sol/media/briefs/deere(A)-04-02-2008.pdf ("Secy's Brief").

2. Petitioners' Request For Rehearing And Their Shift From Revenue Sharing To A New Theory Of Imprudence.

Petitioners sought rehearing and rehearing en banc. Although continuing to press their contention that the Section 404(c) safe harbor did not apply to Deere's selection of investment options, petitioners changed the focus of their excessive fees claim under Section 404(a) Abandoning their disclosure claims as well as their contention that the practice of revenue sharing unlawfully inflated the cost of the Plans' mutual fund investment options, petitioners instead accused the panel of erroneously relying on the retail market to determine whether the investments Deere selected were

reasonably priced. *See* Pls. Pet for Panel Rehearing & Pet. for Rehearing En Banc at 1-3, *Hecker*, Nos. 07-3605 & 08-1224 (7th Cir. filed Mar. 9, 2009). Petitioners argued, instead, that fiduciaries of large plans, like Deere's, have substantial negotiating power and that ERISA obligates these fiduciaries to use that power to shop for cheaper investment opportunities, like separate accounts, available to institutional-sized investors in the so-called "wholesale" market. *Id* at 2-3.

The Secretary again appeared as an amicus in support of panel rehearing (but not rehearing en banc) to express her views that the Seventh Circuit misapplied Section 404(c) to the selection of investment options. The Secretary did not, however, join petitioners in requesting "rehearing" of their new retail/wholesale excessive fees claim.

The court of appeals denied rehearing and rehearing en banc. Pet. App. 49a-54a. Rejecting the Secretary's "hypothetical" fear that "some [Section 404(c)] case in the future may arise in which a Plan fiduciary acts imprudently by selecting an overpriced portfolio of funds, and that [the court's] opinion will somehow immunize the fiduciary from accountability for that decision," Pet. App. 52a, the court stressed that its decision "was tethered closely to the facts before the court. Plaintiffs never alleged that any of the 26 investment alternatives that Deere made available to its 401(k) participants was unsound or reckless . . . ." Pet. App 53a

Addressing only briefly petitioners' new basis for their excessive fees theory – their claim that Deere breached its fiduciary duty because it populated the Plans' investment menu with mostly retail funds – the court observed that if Deere received both fund management and plan services for the same fees retail investors paid, the effective cost of participation "may in fact have approached wholesale levels." Pet. App. 53a-54a. The court offered no further discussion of this new breach of fiduciary duty theory, returning to the core of its earlier opinion that "*this* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim upon which relief can be granted." Pet. App. 54a (emphasis in original).

REASONS FOR DENYING THE PETITION

The broad questions that petitioners now seek to present, particularly whether ERISA precludes fiduciaries from offering participants in 401(k) defined contribution plans the opportunity to invest in retail mutual funds, are not properly before the Court. Before their petition for rehearing, petitioners' imprudence claim under ERISA Section 404(a) was predicated entirely on their contention that ERISA prohibited the revenue sharing arrangements between FMR and FMTC that Deere took advantage of to pay plan costs. The courts below rejected that contention as petitioners presented it in the SAC, and their decisions are completely consonant with ERISA and the views of the Secretary, who has taken no issue with this common industry practice.

Petitioners' counsel has argued in numerous other cases that the decision here presents narrow issues quite different from the broad claims petitioners now try to advance. In addition, petitioners' new theory in this Court – that ERISA prohibits large 401(k) plans, like Deere's, from making use of retail mutual funds – is both waived and without merit. The courts below did not fashion a new test for breach of fiduciary duty, nothing in ERISA requires plan fiduciaries to include any particular mix of options in their plans, fully 91% of 401(k) plans include mutual funds as investment options, and the Secretary herself does not support petitioners' theory that it is inappropriate to include retail mutual funds as 401(k) plan offerings

The court of appeals' alternative holding – that ERISA Section 404(c) provided a defense to petitioners' claims – also does not present a controversy that warrants this Court's attention To begin, the courts below provided independent and adequate grounds for their judgments, so there is no need for the Court to reach the Section 404(c) issue. Moreover, there is no circuit court conflict on Section 404(c), and petitioners challenged Section 404(c)'s application only on the narrow ground that Deere had not disclosed Fidelity's revenue sharing practices. The total fees associated with each mutual fund were fully disclosed through fund prospectuses. Pet. App. 7a, 17a; Resp. App. 17a, 18a-19a, SAC ¶¶ 36, 44. That point is unchallenged. The court of appeals also has not ruled on the Secretary's assertion that some investment selection decisions are outside the scope of Section 404(c). Pet. App. 26a. Rather, this case hinges on the issues that petitioners asked the courts below to decide. Like petitioners' belated general attack

on the use of retail funds, resolution of the full scope of Section 404(c) as it applies to investment selection decisions should await another case that actually presents the issue. The petition for a writ of certiorari should be denied.

I. NO BASIS EXISTS FOR REVIEWING THE COURT OF APPEALS' CONCLUSION UNDER SECTION 404(a) THAT DEERE OFFERED A PRUDENT MENU OF INVESTMENT OPTIONS.

A. Petitioners Limited Their Prudence Challenge To Revenue Sharing Arrangements, The Courts Below Rejected It, And Petitioners Offer No Basis For Overturning That Decision.

Petitioners contend that the "crux" of their claim is that "Deere could readily have selected other investment vehicles – such as institutional mutual funds – with significantly lower fees," rather than the retail mutual funds that were offered under the Deere plans. Pet. 24-25; *see id.* at i, 2, 7, 14, 29-30, 33-34. That is incorrect. Though the Deere plans in fact offered retail mutual fund investments, petitioners did not contend below that the Plans' offerings were overpriced *because* they were retail funds. Petitioners' SAC and argument to the courts below made a much narrower claim: that the asset fees charged against each investment offering were "excessive" because the investment advisor (FMR) engaged in allegedly undisclosed revenue sharing with the Plans' Trustees and primary service provider (FMTC). Pet. App. 16a, 36a.

In the courts below, petitioners asserted that:

> Defendants breached their fiduciary duties by selecting investment options that assessed excessive administrative fees against the Plans via Fidelity's undisclosed "revenue-sharing" program and thereby causing the Plans to pay unreasonable expenses, and by failing to exercise the prudence and loyalty ERISA requires of fiduciaries operating a $3 billion retirement plan.

Joint Consolidated Br of Pls.-Appellants, *Hecker*, Nos. 07-3605 & 08-1224 (7th Cir. filed Mar. 28, 2008) Contrary to the broad implications petitioners attempt in this Court to attribute to the decision below, in numerous other ERISA cases filed by petitioners' counsel (approximately fourteen), petitioners' attorneys have sought to confine the decision as follows:

> Simply stated, *Hecker* involved claims for lack of disclosure and excessive fees paid to the plans' record keeper through "revenue sharing" whereby retail mutual funds forwarded a portion of asset-based investment fees to the plans' record keeper.

Pls.' Status Report of Case and Appellate Proceedings at 4, *Will v. Gen. Dynamics Corp.*, No. 3.06-CV-698-GPM (S.D. Ill. filed Aug. 11, 2009) *See also* Pls. Notice of Supplemental Auth. Regarding Further Developments in *Hecker v. Deere* at 1, *Nolte v. CIGNA Corp.*, No. 2:07-CV-2046-HAB-DGB (C.D Ill filed July 6, 2009) (The Seventh Circuit "unambiguously limit[ed]

the impact of that decision to the unique and inapplicable facts in that case.") According to petitioners' counsel, "the Seventh Circuit restrained the effect of *Hecker I* by repeatedly emphasizing that it was limited to the sufficiency of the facts pleaded in the complaint in that case." Appellants' Reply Br. at 8, *Taylor v. United Tech. Corp.*, No. 09-1343-cv (2d Cir. filed Aug. 10, 2009); Pls. Mem. in Supp. for Leave to File Third Am. Compl. at 2, *Martin v. Caterpillar, Inc.*, No. 07-1009 JBM/JAG (C.D. Ill. filed Nov 5, 2009) ("[T]he Seventh Circuit denied the *Hecker* Plaintiffs' Motion for Rehearing, but significantly modified and narrowed its ruling to one based solely on the Complaint in that case "); Pls.' Resp. to Defs.' June 26, 2009 Notice of Supplemental Auth at 1, *Spano v. Boeing Co.*, No 06-743-DRH at 1 (S.D. Ill. filed June 29, 2009) ("[T]he panel's opinion 'was limited' to the facts and pleadings in *Hecker*.").

Both the district court and the court of appeals understood petitioners' claim in precisely this way. The district court carefully reviewed the investment options offered, petitioners' complaints about revenue sharing between the Fidelity entities, whether ERISA as currently written requires disclosure of revenue sharing arrangements, and legislative proposals to amend ERISA to require disclosure of revenue sharing. The court correctly ruled that petitioners were unable to state either a disclosure or a fiduciary breach claim based on an undisclosed revenue sharing arrangement. Pet. App. 33a-35a, 37a-42a.

The court of appeals affirmed, observing that "[t]he Hecker group's case depends on the proposition that there is something wrong, for ERISA purposes, in that

[revenue sharing] arrangement." Pet. App. 17a. The court concluded that because the petitioners acknowledged "participants were told about the total fees imposed by the various funds, and the participants were free to direct their dollars to lower-cost funds if that was what they wished to do," undisclosed revenue sharing did not establish either a disclosure or fiduciary breach claim under ERISA. Pet. App. 7a-8a, 16a-19a; *accord* Secy's Br. at 20 (ERISA does not require disclosure of revenue sharing).[2]

Both the district court and the court of appeals also rejected petitioners' claim that Deere breached its fiduciary duty by offering plan investment options whose charges were excessive. Both courts found this contention untenable based upon the undisputed factual record regarding the array of investment options and their prices. Pet. App. 19a-20a, 46a. As the court of appeals explained:

> In our view, the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants Thus, even if, as plaintiffs urge, there is a fiduciary duty on the part of a company offering a plan to furnish an acceptable array of investment vehicles, no

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[2] The Securities and Exchange Commission, the primary federal regulator of mutual funds, has long acknowledged that revenue sharing payments from the legitimate profits of mutual fund investment advisers and their affiliates is appropriate in similar situations *See* Investment Company Institute, SEC No-Action Letter, 1998 WL 1543541 (Oct 30, 1998).

> rational trier of fact could find, on the basis of the facts alleged in this Complaint, that Deere failed to satisfy that duty As the district court pointed out, there was a wide range of expense ratios among the twenty Fidelity mutual funds and the 2,500 other funds available through BrokerageLink. At the low end, the expense ratio was .07%; at the high end, it was just over 1%. Importantly, all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition The fact that it is possible that some other funds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).

Pet App. 19a-20a. The petition offers no basis for reviewing the lower courts' decision not to second-guess the fiduciary's judgments under these specific circumstances *See Braden v. Wal-Mart Stores, Inc.*, __ F.3d __, No. 08-3798, 2009 WL 4062105, at *8 nn.6-7 (8th Cir Nov. 25, 2009) (agreeing with the Seventh Circuit's statement in *Hecker* that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund" and observing that the case before it involved a "far narrower range of investment options").

Indeed, although the fees paid by petitioners were the same as those paid by the general public, they were effectively *less* because Deere participants receive more

services than most shareholders. As petitioners' SAC alleged, participants in the Deere plans not only received investment management services from FMR but also trustee and recordkeeping services from FMTC – services that the public at large does not receive. Resp. App. 16a, 28a, SAC ¶¶ 34, 70. In fact, the SAC understates the services provided by FMTC to Deere participants, these services include not only trustee and recordkeeping services but also participant phone and web services, daily valuation services, in-kind processing, participant loan servicing, preparation of year-end tax documents, and communications describing available investment options *See supra* pp. 3-4. There is no dispute that FMR charged fees to manage the funds in which Deere participants invested that were no higher than it charged Fidelity retail customers, or that FMTC provided services to Plan participants that retail customers did not receive. Resp. App. 17a-19a, SAC ¶¶ 36, 44

B. Petitioners' New Theory Challenging The Use Of Retail Funds Was Waived, And Lacks Statutory, Empirical, Judicial, Or Agency Support.

Following their initial loss in the court of appeals, petitioners abandoned their excessive cost contention based on revenue sharing between the Fidelity entities, and recast their claim in their rehearing petition to assert imprudence by Deere because its investment lineup was not populated entirely with separate "wholesale" accounts. This new theory is the one that petitioners now pursue in this Court. Petitioners' new argument was not raised on a timely basis in the courts

below, and therefore it has been waived. In any event, the theory is without merit.

First, there is no express statutory basis for outlawing retail funds. As the court of appeals correctly observed, "nothing in the statute . . requires plan fiduciaries to include any particular mix of investment vehicles in their plan." Pet. App. 20a. *See Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) ("ERISA does not impose a 'duty to take any particular course of action if another approach seems preferable.'") (citation omitted)

Second, industry practice does not support petitioners' (and their *amici*'s) argument that retail mutual funds are unsuitable for large defined contribution plans. Such funds are not only suitable, they also are the overwhelming choice of professional plan managers. A Deloitte Consulting survey, for example, showed that, as of the date this case was filed, mutual funds were the most common investment options in 401(k) plans, with *91%* of plans offering them. *See* Deloitte Consulting, *Annual 401(k) Benchmarking Survey. 2005/06 Edition* ("Deloitte Survey"), 19 ex. 71 (2006), *available at* http //www.ifebp.org/pdf/research/2005-06Annual401kSurvey.pdf; *see also* Investment Company Institute, *2008 Investment Company Fact Book*, 92 fig. 7.7 (48th ed. 2008), *available at* http://www.icifactbook.org/pdf/2008_factbook.pdf (as of 2007, 55% of 401(k) plan assets – nearly $1 7 trillion – were invested in mutual funds) Perhaps for this reason, the Secretary stresses that her views on fiduciary duty "should not be construed as suggesting that it is per se illegal for ERISA employee benefit plans to include retail mutual fund options." Br. of Sec'y of Labor as Amicus Curiae in

Supp. of Pl.-Appellant at 18 n. 6, *Braden v. Wal-Mart Stores, Inc.*, No. 08-3798 (8th Cir. filed Mar. 13, 2009), available at http://www dol.gov/sol/media/briefs/braden(A)-03-13-2009.pdf. In addition, industry use of non-retail alternatives, such as allegedly lower cost separate accounts – petitioners' preferred alternative — is relatively rare. *See* Deloitte Survey, 19 ex. 71 (20% of 401(k) plans offered separate accounts as investment options). There are reasons for this – petitioners' assertion that mutual funds and unregistered investment accounts provide "identical" or even similar services is a fiction – but the current record provides this Court with no basis to review petitioners' new theory.

At its most basic level, Section 404(a) requires a fiduciary to "discharge his duties with respect to a plan . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . ." 29 U.S.C. § 1104(a)(1)(B); *see Katsaros v Cody*, 744 F.2d 270, 279 (2d Cir. 1984). Courts therefore apply an objective benchmark by measuring a fiduciary's behavior against the standards in the investment industry. *See In re Unisys Sav Plan Litig.*, 173 F3d 145, 151 (3d Cir. 1999) (affirming district court finding of prudence in part because "[t]he prevailing view in the investment world at that time was that high yield guaranteed insurance contracts were good risks"); *Ulico Cas. Co. v Clover Capital Mgmt., Inc* , 335 F. Supp. 2d 335, 340 (N.D.N.Y 2004) (measuring fiduciary conduct "against the standards in the investment industry"); *Lanka v.*

O'Higgins, 810 F. Supp. 379, 387 (N.D.N.Y. 1992) (same); *see also Glennie v. Abitibi-Price Corp.* 912 F. Supp. 993, 1003-04 (W.D. Mich. 1996) (rejecting challenge to plan's choice of guaranteed investment contract provider based in part on survey showing similar plans chose same provider); *cf Wsol v Fiduciary Mgmt. Assoc., Inc.*, 266 F.3d 654, 657-58 (7th Cir. 2001) (measuring ERISA reasonableness by reference to the "standard" price available in the "market"). Thus, it is unsurprising that courts have rejected blanket challenges to fiduciary use of common investment products, like mutual funds, in 401(k) plans. *See Young v. Gen Motors Inv. Mgmt. Corp.*, 325 F. App'x. 31 (2d Cir. May 6, 2009) (summary order) (affirming dismissal of ERISA breach of fiduciary claim alleging improper investment in Fidelity mutual funds because plaintiffs failed to allege that fees were so excessive relative to the services rendered that they could not have been the product of arm's-length negotiations).[3]

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[3] *Accord Tibble v Edison Int'l*, 639 F. Supp 2d 1074, 1115-17 (C D Cal. 2009) (granting summary judgment to fiduciaries on claim that retail mutual funds were per se imprudent), *Taylor v United Tech Corp.*, No 3 06-cv-1494 (WWE), 2009 WL 535779, at *10 (D Conn. Mar 3, 2009) (rejecting expert opinion that "less-costly managed separate trust accounts outweigh the advantages of mutual funds"), *aff'd*, No 09-1343, 2009 WL 4255159 (2d Cir. Dec 1, 2009) (summary order); *Kanawi v Bechtel Corp.*, 590 F Supp. 2d 1213, 1229-30 (N D Cal 2008) (rejecting per se prohibition on retail mutual funds).

C. The Court Of Appeals Did Not Apply "Newly-Minted" Principles To Absolve Deere Of Fiduciary Liability.

To sidestep the allegations and legal theory they pursued in the courts below, petitioners ignore the wide range of investment options offered in the Deere Plans, their varying cost structures, and the services provided by FMTC that are paid for through revenue sharing with FMR. Instead, petitioners accuse the court of appeals of focusing its prudence inquiry solely on results rather than the process by which Deere offered investments. This approach, petitioners contend, constitutes a "newly minted" test under Section 404(a)(1)(B), which allegedly departs from the process test used in other circuits that gives primacy to the methods by which fiduciaries "'investigate the merits of the investment. . . .'" Pet. 22, 25 (quoting *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 86 (2d Cir. 2001)). This contention is meritless. Although petitioners argued that the Deere fiduciaries should have been more knowledgeable, their principal grievance always centered on revenue sharing. "Process," as such, was never petitioners' focus.

Moreover, the circuits, including the Seventh (long before this case), have lined up consistently to hold that, to be actionable, the plaintiff must establish a causal connection between the conduct alleged and losses "resulting from" that conduct. ERISA Section 409(a), 29 U.S.C § 1109(a); *see* Resp. App. 44a, SAC ¶ 108; *Braden*, 2009 WL 4062105, at *6 ("In order to state a claim under [ERISA § 404(a)], a plaintiff must make a prima facie showing that the defendant acted as a

fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan."), *Wright v Oregon Metallurgical Corp* , 360 F.3d 1090, 1099 (9th Cir. 2004) ("'[A] plaintiff must show a *causal link* between the failure to investigate and the harm suffered by the plan.'") (emphasis in original) (quoting *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)), *Diduck v Kaszycki & Sons Contractors, Inc* , 974 F.2d 270, 279 (2d Cir. 1992) ("[P]roof of a causal connection . . is required between a breach of fiduciary duty and the loss alleged."), *overruled on other grounds*, *Gerosa v. Savasta & Co., Inc* , 329 F3d 317 (2dCir. 2003); *Brock v. Robbins*, 830 F.2d 640, 646 (7th Cir. 1987) (rejecting a failure to investigate claim because "the record supports the district court's finding that the fee terms were in fact reasonable and that therefore there was no loss resulting from trustees' imprudent conduct").

Based on the facts alleged, the court of appeals correctly concluded that petitioners were not injured because they could choose from a variety of investment options with varying costs (including some that were comparable to or below the average costs of the institutional investments that petitioners now favor). As Justice Scalia has observed:

> I know of no case in which a trustee who has happened – through prayer, astrology or just blind luck – to make (or hold) objectively prudent investments (e.g., an investment in a highly regarded "blue chip" stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.

Fink v Nat'l Sav & Trust Co, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

Also known as the "hypothetical prudent fiduciary" test, this causation requirement insulates a fiduciary from liability, notwithstanding a failure to conduct an investigation before making a decision, "if a hypothetical prudent fiduciary would have made the same decision anyway" *Roth v. Sawyer-Cleator Lumber Co*, 16 F.3d 915, 919 (8th Cir. 1994) ("[T]he relevance that the facts relating to the stock hold is that they tend to show that the trustees' decision was objectively reasonable regardless of the process by which they reached it and thus that there was no causal connection between their allegedly deficient conduct and a loss to the ESOP."); *see also Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300 (5th Cir. 2000) ("ERISA's obligations are nonetheless satisfied if the provider selected would have been chosen had the fiduciary conducted a proper investigation."); *In re Unisys Sav Plan Litig.*, 173 F.3d 145, 153-154 (3d Cir. 1999) (applying the "'hypothetical prudent investor test'") (citation omitted).

Thus, far from "minting" a new test, the court of appeals sifted through the allegations that plaintiffs presented and ruled against plaintiffs on the merits of their revenue sharing-fiduciary breach claims. There is no circuit conflict; the decision below is completely consonant with the precedents of the other courts of appeals under Section 404(a). What remains, then, is nothing more than petitioners' disagreement, not with the applicable legal test, but with the factual conclusion on the allegations of this case that the costs associated

with the mutual funds Deere offered to participants were in fact consistent with the decisions of a hypothetical prudent fiduciary. Such a disagreement over a properly stated test, allegedly misapplied to the facts of this case, provides no basis for review here. *See* Sup. Ct R. 10.

D. Questions About Fees In The Mutual Fund Industry Raised In *Jones* Have No Current Implications For ERISA Fiduciaries.

Lastly, petitioners suggest that the Court may wish to hold their petition pending the Court's ruling in *Jones v Harris Associates, L P*, 129 S. Ct. 1579 (2009) (No. 08-586). Pet. 32-34. There is no basis to await the decision in *Jones*. As explained above, the issue petitioners presented in the SAC were narrowly framed claims that did not call into question the efficacy of mutual fund investments in defined contribution plans under ERISA, much less under § 36(b) of the Investment Company Act of 1940, 15 U S C. § 80a-35(b) *et seq.* ("ICA"), addressed in *Jones*.

Specifically, as the Solicitor General acknowledged in her brief in *Jones*, the ICA and ERISA claims at issue involve different legal structures, different duties, and different legal tests. *See* Br. of U.S as Amicus Curiae Supporting Pet'rs at 27 n.8, *Jones*, No. 08-586 (U.S. filed June 15, 2009) ("Because Section 36(b) and ERISA have different statutory language, histories, and purposes, the resolution of this case should not establish the legal standard that should apply to excessive-fee claims against plan fiduciaries under ERISA."). The ICA actually sets up a unique standard under which, besides having to negotiate with an independent board of

trustees, a mutual fund's investment advisor has a fiduciary duty with respect to its own fees. ICA § 36(b). The prevailing standard in ICA § 36(b) actions, now being reviewed by this Court, has been whether the resulting fees were so disproportionately excessive that they could not have been the subject of arm's-length bargaining. *See Jones v Harris Assocs., L.P.*, 537 F.3d 728, 729 (7th Cir. 2008) In contrast, the ERISA issue here is whether, as compared to the choices of other prudent fiduciaries in similar situations, this fiduciary's choices of investment options, and other services provided by third parties, were either the outcome of a prudent process or resulted in the plan incurring service fees that were not unreasonable.[4]

Furthermore, petitioners mistakenly assume that Judge Posner's observations in *Jones*, which were made in the context of defined benefit pension plans, automatically apply in equal measure in the context of defined contribution 401(k) plans. *See* Pet. 33. Even if one were to assume, as Judge Posner suggested, that fiduciaries of *defined benefit* plans should negotiate advisory fees directly with fund providers, that would not imply that fiduciaries of *defined contribution* plans would be obliged to proceed in the same manner. As this Court recently made clear, there are fundamental

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[4] Contrary to their position in this Court, petitioners' attorneys have argued elsewhere that cases decided under the ICA have little relevance to ERISA cases. *See* Appellants' Pet. for Panel Rehearing & Rehearing En Banc at 1, *Taylor*, No. 09-1343-cv (2d Cir. filed Dec. 14, 2009) (criticizing district court for "justifying its reliance on ICA cases to interpret ERISA, because no Court has authoritatively connected the two statutes")

differences between these two types of retirement plans. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 522 U.S. 248, 128 S. Ct. 1020, 1025 (2008) ("*Russell*'s emphasis on protecting the 'entire plan' from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed. Defined contribution plans dominate the retirement plan scene today."). As ERISA Section 404(a)(1)(B) confirms, fiduciaries are required to administer their plans as would a prudent man "in the conduct of an enterprise of a *like* character and with *like* aims " 29 U.S.C § 1104(a)(1)(B) (emphasis added) Because defined benefit plans are not *like* defined contribution plans, what might be expected of fiduciaries of the former is not necessarily what can or should be required of fiduciaries of the latter.

Petitioners attempt to get around industry practice by arguing in effect that the entire industry is rigged and that *all* fiduciaries of defined contribution plans are mismanaging plan assets to the extent they authorize participant investment in retail mutual funds. Pet. 33-34. Relying on Judge Posner's comment in *Jones* that market competition is ineffective to restrain retail mutual fund fees, petitioners contend that this inefficiency undermines the court of appeals' decision in this case that mutual fund fees are "set against the backdrop of market competition" and that mutual funds are suitable investment options for defined contribution plans. *Id* It does not, for three reasons.

First, Judge Posner's observations in *Jones* were well known to the panel that decided this case – indeed, two of the three members of the panel (Judges Wood and Tinder) joined Judge Posner's earlier dissent from

the denial of rehearing en banc in *Jones*. *See Jones*, 537 F.3d 728. The panel plainly did not think *Jones* should affect the decision here. Second, petitioners used *Jones* liberally in their request for rehearing en banc and neither Judge Posner nor any other judge voted to rehear the case. Pet. App. 50a. Third, Judge Posner's observations about alleged abuses in the mutual fund industry implicate both a different law (the ICA) and different standards *See supra* pp. 24-25. ERISA does not prohibit retail fund investments in defined contribution plans, as the court of appeals correctly recognized Pet. App. 20a.

II. THE COURT OF APPEALS' ALTERNATIVE HOLDING – THAT SECTION 404(c)'S SAFE HARBOR INSULATED DEERE FROM LIABILITY FOR PLAN LOSSES – ALSO CREATES NO CONFLICT, AND FAITHFULLY IMPLEMENTS THE STATUTORY TEXT.

The court of appeals properly held that, even if it had "underestimated" Deere's fiduciary responsibilities, the safe harbor provided by Section 404(c) provided "an alternate ground for affirmance " Pet. App. 21a Thus, on its own terms, the 404(c) ruling was not necessary to the judgment below, and therefore is not appropriate for this Court's review.

In addition, the Seventh Circuit's ruling was correct and not in conflict with other circuits. Section 404(c) protects fiduciaries from liability for investment losses in plans, like Deere's, that provide for individual accounts and allow a participant "to exercise control over the assets in his account." 29 U S.C § 1104(c)(1)(A);

see Pet. App. 21a-27a; *id.* at 51a-52a ("[T]he complaint . . . contained enough information to warrant the conclusion that Deere was entitled to the safe harbor defense."). In this case, plaintiffs conceded that the total fees charged were fully disclosed, Pet. App. 7a, 17a; Resp. App. 17a, 18a-19a, SAC ¶¶ 36, 44, and the court of appeals applied Section 404(c) narrowly to the facts alleged. There is no conflict in the circuits as petitioners contend, and the court of appeals has not held that Section 404(c)'s safe harbor shields all fiduciary investment selection decisions from scrutiny.

A. No Circuit Split Exists Over Section 404(c)'s Applicability To Menu Selection.

Petitioners ignore that allegedly undisclosed revenue sharing between the Fidelity entities was the only basis on which petitioners challenged the applicability of Section 404(c) in their SAC. As the court of appeals recognized, petitioners waived all other challenges to Section 404(c), Pet. App. 24a-25a; Resp. App. 33a-37a, SAC ¶¶ 91-102, and did not challenge Deere's investment selection decisions as "unsound or reckless " Pet. App. 53a. Review of the decision below is not warranted.

Section 404(c) provides, in relevant part:

> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

* * *

> no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1104(c)(1). Pet. App. 56a.

Only two other circuits have actually ruled on the applicability of the Section 404(c) safe harbor to a plan fiduciary's investment selection, and their decisions are consistent with the Seventh Circuit's ruling here. *See Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 309 (5th Cir. 2007); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996). Petitioners attempt to manufacture a conflict by pointing to contrary language in a footnote in *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007), but that comment is dictum. The applicability of Section 404(c) was not an issue on appeal. In that case, the defendant fiduciaries prevailed on the merits following a trial on the plaintiffs' fiduciary breach claims. The Fourth Circuit affirmed, holding that it was prudent to offer U.S. Airways stock in a 401(k) plan despite the decline in the stock's value following the September 11, 2001 terrorist attacks. The court's comments regarding Section 404(c) were superfluous, since neither party briefed the subject and the safe harbor defense was not needed given the lack of liability in the first place. Thus, the purported split is illusory.

B. The Secretary's Preamble Footnote Construction Of Section 404(c) Is Contrary To The Plain Statutory Text, And Is Not Entitled To Deference.

Petitioners rely heavily on the Secretary's construction of Section 404(c). That construction stems from a footnote to the 1992 preamble to the regulations implementing Section 404(c), which state that the "act of limiting or designating investment options . . . is not a direct or necessary result of any participant direction of such plan." Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed Reg. 46,906, 46,924 n 27 (Oct. 13, 1992) [5] Petitioners contend that the Secretary's footnote is entitled to deference, and that review is necessary to correct the court of appeals' refusal to abide by it. Petitioners are incorrect. Section 404(c) is merely an alternative ground for the court of appeals' decision, and the court would have reached the same outcome even apart from Section 404(c). In any event, the Secretary's footnote is contrary to the plain text of the statute and is not binding agency action to which the lower court was obliged to defer.

The Secretary's footnote is misguided. Plan sponsors or fiduciaries *always* select investment options

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[5] Petitioners reproduce in the Appendix the Secretary's implementing regulations to Section 404(c) – 29 C.F.R. § 2550.404c-1. Pet. App. 62a-83a. These regulations do not include the Secretary's footnote about Section 404(c), because the footnote appeared only in the preamble, which did not make its way into the Code of Federal Regulations. *See Langbecker*, 476 F.3d at 311 n.22.

in defined contribution plans. Participants never do. If the Secretary were correct, Section 404(c) would be written out of the statute for any plan whose investments were chosen by the plan sponsor or fiduciary. Moreover, as the Fifth Circuit observed in *Langbecker*, investment losses in a participant-directed plan cannot occur without a corresponding participant decision to invest. 476 F.3d at 310, 312. The upshot of the Secretary's construction is to "render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary." *Id.* at 311; *accord Unisys*, 74 F.3d at 445.

The statute's plain text does not support the Secretary's footnote. Rather, the text expressly *confines* the Secretary's regulatory authority under Section 404(c) to promulgating regulations that define the meaning of participant "control *over the assets in his account*." *See* 29 U.S.C. § 1104(c)(1)(A) (emphasis added). The Secretary has done that in regulations that the court of appeals painstakingly applied in a straightforward fashion. Pet. App. 21a-23a (citing 29 C.F.R. §§ 2550.404c-1(b)(1)(ii), (b)(2)(ii)(C), (b)(2)(i)(B), (b)(2)(i)(B)(1)(v), (b)(2)(i)(B)(2), (b)(2)(ii)(A) & (c)(2)(ii)). As the regulations require, the court determined that the Deere plans gave participants control over their investment options. The participants were able to choose "'from a broad range of investment alternatives'" and were provided "'sufficient information to make informed decisions with regard to investment alternatives available under the plan'" which included nine "clear labeling" criteria. Pet. App. 21a-23a (citing 29 C.F.R. § 2550.404c-1(b)). As the court of appeals observed, the regulation "sets forth nine criteria that must be met

before the participant may be considered to have sufficient investment information." Pet App. 21a. The court concluded that the Deere plans satisfied these criteria and Deere participants independently exercised control over their investments. Pet. App. 23a. Participants receive the protection they need because the Secretary's rigorous regulatory requirements ensure that Section 404(c) can be invoked only in appropriate circumstances.

The Secretary's footnote, by contrast, disregards the statutory phrase "over the assets in his account" and thereby seeks to expand the Secretary's authority to regulate matters under Section 404(c) over which participants do not have control generally, including investment selection. Even if the footnote were itself a regulation – which it is not – it would be inconsistent with Section 404(c)'s carefully drafted statutory text.

Finally, this Court's precedents make clear that a prerequisite for deference to an agency interpretation is ambiguity, either in a statute the agency is charged with administering ("*Chevron* deference") or in a regulation the agency is authorized to promulgate ("*Auer* deference"). *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000) ("In *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute."); *id.* at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). Neither plaintiffs, nor the Secretary, nor any court that has considered Section 404(c)'s scope, however, has suggested that Section 404(c) is ambiguous so as to justify deference to the Secretary's

interpretation. *See, e.g.*, *Langbecker*, 476 F3d at 311 (noting that Section 404(c)'s meaning is "tolerably plain"); *id.* at 311 n.22 (no deference to the Secretary where there is no ambiguity).

Under the plain statutory text, the Secretary may regulate the meaning of participant control "over the assets in his account" – not participant control in general as the footnote seeks to do. Furthermore, Section 404(c), by its terms, applies to "*any* breach." 29 U.S.C. § 1104(c)(1)(A)(ii) (emphasis added). Through its use of the word "any," the statutory text rejects any construction that would withdraw certain kinds of fiduciary breaches from its ambit.[6] *See Mertens v Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.") (emphasis in original). Review of the court of appeals' alternate holding under Section 404(c) is not justified.

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[6] The only qualifier is that a participant decision to invest must also have contributed to the loss *Langbecker*, 476 F.3d at 309-11 *See also* H R. Conf Rep No 93-1280, at 305 (1974), *reprinted in* 1974 U S C.C A.N 5038, 5086 ("[I]f the participant instructs the plan trustee to invest the full balance of his account in, e g , a single stock, the trustee is not to be liable for any loss because of a failure to diversify *or because the investment does not meet the prudent man standards* ") (emphasis added)

III. PETITIONERS MISSTATE THE IMPACT OF THE COURT OF APPEALS' DECISION; BY CONTRAST, THE IMPLICATIONS OF REVERSAL ARE ENORMOUS.

Petitioners' policy arguments for review are also without merit. Petitioners claim that the court of appeals has created a Section 404(a) "rule that allows pension plan fiduciaries to invest in a range of retail mutual funds without investigating [ ] lower-priced institutional investment vehicles" and that this alleged rule "will inflict enormous financial losses on the pension plan assets of tens of millions of American workers." Pet. 30. This is a gross misstatement.

The court of appeals did not fashion any "rule" of fiduciary responsibility under Section 404(a) that dispenses with a fiduciary's duty to investigate To the contrary, the court carefully reviewed the Deere Plans and the extensive investment options offered to participants, and it explained why the revenue sharing arrangements about which petitioners complained did not involve any violation of Section 404(a). The court also expressly rejected a construction of its opinion as a "sweeping statement that any Plan fiduciary can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." Pet. App. 52a-53a. Instead, the court stressed that its opinion was "tethered closely to the facts before the court." *Id.* at 53a. "[*T*]*his* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much

variation in associated fees, failed to state a claim upon which relief can be granted." *Id.* at 54a (emphasis in original).

Petitioners next suggest that the court of appeals' holding regarding Section 404(c) effectively creates blanket immunity for fiduciaries who breach their responsibilities in selecting plan investment alternatives, thereby obliterating the protections ERISA Section 404(c) provides to participants. Petitioners again ignore Section 404(c)'s plain text and its stringent regulations defining what it means for participants to have control over the assets in their accounts, and exaggerate both the breadth of the decision below and the reach of ERISA's participant protection provisions.

The court of appeals correctly rejected petitioners' and the Secretary's polar construction that the safe harbor can *never* apply to the selection of plan investment options. Pet App. 26a. To the contrary, the court followed the statute and ruled that a fiduciary can take advantage of the Section 404(c) safe harbor *if* it satisfies the criteria of Section 404(c), including the Secretary's implementing regulations defining participant control over the assets in their accounts. *See id.* The court emphasized the Secretary's many regulatory preconditions, including the requirements that fiduciaries structure their plans to give participants control over the assets in their accounts, make available a broad range of investment alternatives, and provide at least *nine* separate categories of investment information Pet. App 21a-23a. The decision below thus confirms that, although the safe harbor can be a

significant affirmative defense, it is also limited in that only diligent fiduciaries will qualify for it. Other fiduciaries must fend for themselves in the usual way – by establishing their prudence under Section 404(a). *See Jenkins v. Yager*, 444 F.3d 916, 924-26 (7th Cir. 2006).

As this Court has recognized, "ERISA [is] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. Although the fiduciary responsibility provisions in Section 404(a) are unquestionably critical elements in the statutory scheme, there is more to the statutory analysis than simply whether the outcome is "good" or "bad" for participants and retirees. Participants received the protection of a fiduciary in Section 404(a), but fiduciaries received something, too – the protection of a limited safe harbor in Section 404(c). Section 404(c) rejected the notion that fiduciaries are subject to limitless liability for all breaches, and any construction of Section 404(c) that removes this statutory limit to liability does violence to the statutory scheme.

In contrast to the Seventh Circuit's balanced approach, petitioners seek a reversal that would threaten with per se civil liability the fiduciaries of more than 90% of the nation's defined contribution plans that include common investment products – retail mutual funds – that petitioners now seek to outlaw. This would set a dangerous and far-reaching precedent, subjecting virtually all 401(k) fiduciaries to costly litigation that ultimately will harm participants throughout the United States. ERISA does not require employers to establish employee benefits plans. *See Lockheed Corp. v. Spink*,

517 U.S. 882, 887 (1996). And employers can just as easily stop offering these plans if the costs of doing so become too high. *Cf Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("It is possible for litigation about pension plans to make everyone worse off."). A greater deterrent to continued plan sponsorship is hard to imagine than a post-hoc construction of a statute that would declare as illegal the conduct of the fiduciaries for thousands of defined contribution plans, subjecting them to personal liability simply because they used commonly accepted financial products, like mutual funds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 16, 2009

APPENDIX

APPENDIX A — SECOND AMENDED COMPLAINT FOR BREACH OF FIDUCIARY DUTY DATED MARCH 26, 2007

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WISCONSIN

CASE NUMBER. 06-C-0719-S

JURY TRIAL DEMANDED
AMENDED CLASS ACTION COMPLAINT

DENNIS HECKER, JONNA DUANE, WILLIAM WALLACE, ROGER BRADLEY, and JANICE RIGGINS, individually and on behalf of all those similarly situated

Plaintiffs,

v.

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST COMPANY, and FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants.

SECOND AMENDED COMPLAINT FOR BREACH OF FIDUCIARY DUTY

INTRODUCTION

1. Personal savings accounts, such as 401(k)s, are quickly becoming employees' primary method of

financially planning for retirement. For many employees in the United States today, an employer-provided defined benefit pension awaiting their retirement is a quaint, historical notion.

2. In 401(k) plans, employers provide an opportunity for employees to save their own pre-tax dollars in individual 401(k) accounts. The accounts provide a number of investment alternatives into which employees place a portion of their current income with the hope of earning, over time, a return sufficient to support themselves and their families in retirement.

3. Accordingly, in 401(k) plans, the return on employees' investments is critical. Even seemingly small reductions in a participant's return in one year may substantially impair his or her accumulated savings at retirement.

4. While such reductions in 401(k) accounts' returns may result from market fluctuations, a consistent, albeit rarely discussed, force reducing 401(k) accounts' earnings is the administrative fees and expenses assessed against account balances.

5. The most certain means of increasing the return on employees' 401(k) savings is to reduce the fees and expenses employees pay from their 401(k) accounts.

6. Unlike generalized market fluctuations, employers can control these fees and expenses. Federal law requires them to do so.

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7. Under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), an employer who provides a 401(k) plan for its employees is a "Plan Sponsor." The employer or its agent may also serve as "Plan Administrator," or the employer may appoint a third party to serve as such. The Plan Sponsor and the Plan Administrator, among others, are fiduciaries of the 401(k) plan. The Plan Administrator performs or contracts for administrative, record-keeping, investment management, and other services from entities in the financial and retirement industry. ERISA requires that the fees for these services must be reasonable, incurred solely for the benefit of Plan participants, and fully disclosed.

8 For providing various services, third-party plan administrators, record-keepers, consultants, investment managers, and other vendors in the 401(k) industry have developed a variety of pricing and fee structures.

9 At best, these fee structures are complicated and confusing when disclosed to Plan participants. At worst, they are excessive, undisclosed, and illegal.

10. In this action, pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a), Plaintiffs and Class Representatives, on behalf of all similarly situated participants and beneficiaries of the John Deere Savings & Investment Plan, Plan No. 003 and the John Deere Tax Deferred Savings Plan, Plan No 008 (herein the "Plan" or "Plans"), seek to recover the losses suffered by the Plans on a plan wide basis and to obtain injunctive and other

equitable relief for the Plans from the Plans' fiduciaries based upon the fiduciaries' breaches of fiduciary duties.

11. As set forth in detail below, the fees and expenses paid by the Plans, and thus borne by Plan participants, were and are unreasonable and excessive; not incurred solely for the benefit of the Plans and the Plans' participants; and undisclosed to participants. By subjecting the Plans and the participants to these excessive fees and expenses, and by other conduct set forth below, the Defendants violated their fiduciary obligations under ERISA.

PARTIES, JURISDICTION AND VENUE

Plaintiffs

12. Plaintiff and Class Representative Dennis Hecker lives in Mercer, Wisconsin, within the Western District of Wisconsin. He is a participant in the John Deere Tax Deferred Savings Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7).

13. Plaintiff and Class Representative Jonna Duane lives in Madison, Wisconsin, within the Western District of Wisconsin. She is a participant in the John Deere Savings & Investment Plan within the meaning of ERISA § 3(7), 29 U.S C. § 1002(7).

14. Plaintiff and Class Representative William Wallace lives in Horicon, Wisconsin. He is a participant

in the John Deere Tax Deferred Savings Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7).

15. Plaintiff and Class Representative Roger Bradley lives in Beaver Dam, Wisconsin. He is a participant in the John Deere Tax Deferred Savings Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7).

16. Plaintiff and Class Representative Janice Riggins lives in Coal Valley, Illinois. She is a participant in the John Deere Savings & Investment Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7)

Defendants

17. Defendant Deere & Company ("Deere") manufactures heavy equipment for use in the agriculture, construction, forestry and landscaping sectors. It is one of the world's two leading agricultural machinery manufacturers and employs more than 47,000 people in 26 countries. Within the United States, it has major operations in Illinois, Wisconsin, Minnesota, North Dakota, Iowa, Louisiana, and Georgia. It is registered to do business in Wisconsin and employs several hundred people at its Madison and Horicon facilities

18. Deere is the sponsor of the Plans within the meaning of ERISA § 3(16)(B), 29 U S.C § 1002(16)(B), and is also an administrator of the Plans within the meaning of ERISA § 3(16)(A), 29 U.S C § 1102(16)(A). In its role as administrator, it has the authority and

discretion to select the investments available to Plan participants and beneficiaries, and to control and manage the operation and administration of the Plans. It is a "named fiduciary" within the meaning of ERISA § 402, 29 U.S.C. § 1102, and is also a fiduciary with respect to the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

19. Defendant Fidelity Management Trust Company ("FMTC") is a Massachusetts corporation with its headquarters in Boston. FMTC is a trust company and manages assets for approximately 550 institutional clients worldwide with $113 billion in assets under management as of March 2006. FMTC is a subsidiary of Fidelity Investments, one of the world's largest money managers.

20. Because ERISA requires that the assets of the Plans be held in trust, pursuant to a written trust agreement, ERISA, § 403, 29 U.S C. § 1103(a), Defendant Deere, as Plan sponsor and administrator, designated FMTC the trustee of the Plans. In addition, FMTC is the Plans' record keeper, performing a variety of administrative tasks for the Plans FMTC also directly manages at least two of the investment options available to Plan participants in each of the Plans and is thus a fiduciary to the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

21. FMTC also played a role in the selection of the investment options the Plans make available to participants. Although Deere as Plan Administrator had

final authority for the selection of the investment options, Deere and FMTC agreed that Deere would limit its selection to those securities issued by investment companies for which FMTC's affiliate company, Fidelity Management & Research Company, serves as investment advisor or for which FMTC itself provides investment advice, subject to an exception for certain pre-existing guaranteed investment contracts (GICs) and the Deere Common Stock Fund For these reasons, FMTC is a fiduciary for both Plans pursuant to ERISA § 3(21)(A), 29 U.S.C § 1002(21)(A).

22 Defendant Fidelity Management & Research Company ("FMRCo") is a subsidiary of Fidelity Investments and an affiliate of FMTC. FMRCo is a registered investment company that acts as the leading manager and investment advisor to the Fidelity family of mutual funds and other fiduciary accounts. The Fidelity funds are marketed throughout the United States through a variety of distribution channels, including Fidelity investment centers and over the internet at Fidelity.com. FMRCo exercises discretion in the selection of the investment options the Plans make available to participants and has an obligation to obtain and analyze all material information in selecting these options. In addition, FMRCo exercises discretion over Plan assets when it decides how much Revenue Sharing to send to Fidelity affiliates, like FMTC, and thus offset the Plans' expenses. For these reasons, FMRCo is a fiduciary for both Plans pursuant to ERISA § 3(21)(A), 29 U.S.C § 1002(21)(A).

23. For each Plan, FMRCo is the investment advisor for 23 out of the 26 investment options available to Plan participants. It is paid by the Plans (and thus by the participants and beneficiaries) for its services. It maintains an active Revenue Sharing program, charging more for its services than it expects to keep in order to have additional monies with which to pay its affiliates and business partners. FMTC and FMRCo are referred to herein as "Fidelity."

***Jurisdiction And Venue*:**

24. Plaintiffs seek relief on behalf of the Plans through the mechanisms found in ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502, 29 U S.C § 1132. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

25. The Defendants are subject to service of process issued from this Court pursuant to 29 U.S.C. § 1132(e)(1)(2).

26 Venue of this action is proper pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the injury occurred directly to Plaintiffs in this district where they live and work, because the breaches of fiduciary duty occurred in this district and because the Defendants may be found in this district

Appendix A

The Plaintiff Class

27. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and all similarly situated Plan participants and beneficiaries. They seek to represent the following two classes (herein referred to as "Class" or "Classes"):

> All persons, *excluding individual employees who are or may be liable for the conduct described in this Complaint*, who are or were participants or beneficiaries of the John Deere Savings & Investment Plan, Plan No. 003, and who are, were or may have been affected by the conduct set forth in this Complaint, as well as those who will become participants or beneficiaries of the Plan in the future.
>
> and
>
> All persons, *excluding individual employees who are or may be liable for the conduct described in this Complaint*, who are or were participants or beneficiaries of the John Deere Tax Deferred Savings Plan, Plan No. 008, and who are, were or may have been affected by the conduct set forth in this Complaint, as well as those who will become participants or beneficiaries of the Plan in the future.

28. Certification of each these Classes is proper under Rule 23(a) because all of its prerequisites are satisfied:

a. **Numerosity.** The members of each Class is so numerous that joinder of all members is impracticable. Although the Plaintiffs do not know the exact number of class members as of the date of filing, there were 21,009 participants with account balances in the John Deere Savings & Investment Plan at the end of the 2004 plan year, and 10,186 participants with account balances in the John Deere Tax Deferred Savings Plan at the end of the 2004 plan year.

b. **Commonality.** Common issues of fact and law predominate over any issues unique to individual class members. Issues that are common to all class members include, but are not limited to, whether one or more of the Defendants:

   i. Charged fees and expenses to the Plans that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants;

   ii. Caused the Plans to enter into agreements which in turn caused and/or allowed the Plans to pay fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants,

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iii. Failed to monitor the fees and expenses paid by the Plans and, by such failure, caused or allowed the Plans to pay fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants;

iv. Failed to inform themselves of, and understand, the various methods by which vendors in the 401(k) retirement industry collect payments and other revenues from 401(k) plans;

v. Failed to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plans were reasonable and incurred solely for the benefit of Plan participants;

vi. Failed properly to inform and/or disclose to Plan participants the fees and expenses that are, or have been, paid by the Plans;

vii. Failed to inform and/or disclose to Plan participants in proper detail and clarity the transaction fees and expenses which affect participants' accounts balances in connection with the purchase or sale of interests in investment alternatives;

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viii Failed to disclose that hidden and excessive fees were and are being assessed against Plan assets and failed to stop such hidden excessive fees;

ix. Failed to exercise the care, skill, prudence, and diligence that a prudent person would when acting in like capacity and familiar with such matters when charging, causing to be charged or paid, or failing to monitor the fees and expenses of the Plans;

x. Caused and/or allowed fees and expenses to be paid by the Plans for purposes other than those allowed by ERISA;

xi. Breached their fiduciary and other ERISA-imposed obligations to the Plans, Plan participants, and members of the Classes by engaging in the conduct set forth in this Complaint, revealed in discovery and/or proven at trial;

xii Are liable to the Plans and the Classes for losses suffered as a result of the breaches of their fiduciary and other ERISA-imposed obligations;

xiii. Are responsible to account for the assets and transactions of the Plans and should be charged for any transactions and payments for which they cannot account;

xiv. Are responsible in equity to make restitution of monies that in good conscience belong to each Plan and the participants and beneficiaries.

c. **Typicality.** The Claims brought by the Plaintiffs are typical of those of the absent class members because:

i. The Defendants owed the exact same fiduciary and other ERISA-based obligations to each Plan participant and each member of both Classes;

ii. The Defendants' breach of those obligations constitutes a breach to each Plan participant and each member of both Classes;

iii. To the extent that there are any differences among the Class members' damages, such differences would be a product of simple mathematics based upon their account balances in the Plans. Such minimal and formulaic differences are no impediment to class certification

d. Adequacy of Representation. The Plaintiffs are adequate representatives of the absent class members and will protect such absent class members' interests in this litigation. The Plaintiffs do not have any interests

antagonistic to the other class members nor do they have any unique claims or defenses that might undermine the efficient resolution of the class claims. Plaintiffs have retained competent counsel, versed in ERISA, class actions, and complex litigation.

29. Class certification is also appropriate under Rule 23(b) and each subpart because:

a Pursuant to Rule 23(b)(1), in the absence of certification, there is a risk of inconsistent adjudications with respect to individual class members and adjudications with respect to individual class members would be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests;

b Pursuant to Rule 23(b)(2), as set forth above, the Defendants have acted on grounds generally applicable to each Class as a whole;

c. Pursuant to Rule 23(b)(3), as set forth above, common issues of law and fact predominate over any purely individual issues and thus a class action is superior to any other method for adjudicating these claims.

Appendix A

FACTS

The Plans

30. Deere offers certain of its employees the opportunity to participate in the Plans, as part of their compensation and benefits. Each Plan is a "defined contribution plan," as defined in ERISA § 3(34), 29 U.S.C. § 1002(34) and contains an employee stock ownership plan provision. Each Plan is also a tax-qualified plan of the type popularly known as a "401(k) plan."

31. Deere benefits from its sponsorship of the Plans because giving employees the opportunity to participate in the Plans enhances Deere's ability to recruit and retain qualified personnel, fosters employee loyalty and goodwill, and entitles Deere to tax advantages under the Internal Revenue Code.

Savings & Investment Plan

32. The Savings & Investment Plan ("SIP") was established and is operated under a Plan Document. Under the terms of the SIP qualified employees may contribute certain portions of their before-tax earnings to the Plan. Deere will match those contributions in varying percentages up to 6%. It may also make a profit-sharing contribution to some participants All participants are 100 percent vested in their contributions and allocated net earnings. Some participants — those electing the "Traditional Option"

— are 100% vested in the matching contribution portion at all times, while other participants — those electing the "Contemporary Option — are not fully vested in their matching contributions until after three years of service.

33 Each participant's account is credited with the participant's contributions, the participant's share of Deere's matching contributions and discretionary profit-sharing contributions, if any, and the SIP's earnings and losses allocated daily based on the ratio of the participants respective account balances. FMTC, in its role as Plan record keeper, has the responsibility for keeping track of the individual accounts.

34. As noted above, the assets of the SIP are held in the "John Deere Savings and Investment Plan Trust." In 1990, Defendants Deere and FMTC entered into a trust agreement in which FMTC agreed to provide trustee and recordkeeping services to the SIP, and to be a fiduciary with respect to certain investments.

35. In the document, which has been amended at least 27 times without substantially changing this provision, FMTC disavows any responsibility for selecting the investment options or for rendering advice regarding the selection of investment options. However, the parties agreed that Deere's selection of mutual funds would be limited to funds operated, managed, and/or advised by Fidelity, with an exception for certain pre-existing investments and for the company stock fund.

36. Thus, as of approximately 2004, participating employees could invest Plan contributions in any of 26 investment options selected by Deere subject to the limitations imposed in the agreement with FMTC. Twenty-three of the available options are retail mutual funds operated and managed by FMRCo — the same mutual funds that FMRCo and its parent Fidelity Investments make available to investors large or small on the open market.

37. In addition to the retail mutual funds, the SIP offers two funds managed directly by Fidelity, the "Blended Interest Fund" and the "Fidelity Intermediate Collective Pool." These two options are similar to mutual funds in that they pool money and invest in many different underlying securities. FMTC acts as the investment advisor to these two funds, choosing the amount of each security held. In the agreement, it acknowledges that it is a fiduciary with respect to these funds.

38. The SIP also offers participants the option of investing in the Deere Common Stock Fund, a fund that holds Deere & Company common stock.

39. By the end of 2005, the SIP had more than $2 billion in assets. More than $1 3 billion of those Plan assets are held in Fidelity retail mutual funds.

Tax Deferred Savings Plan

40. The Tax Deferred Savings Plan ("TDS Plan") was established in 1987, and is operated under Plan

Documents. Under the terms of the TDS Plan, qualified employees may contribute certain portions of their before-tax earnings to the Plan. Deere will match those contributions in varying percentages up to 6%. All participants are 100 percent vested in their contributions and allocated net earnings. The Deere matching contributions are vested after a participant has three years of service with the company.

41. Each participant's account is credited with the participant's contributions, the participant's share of Deere's matching contributions, and the Plan's earnings and losses allocated daily based on the ratio of the participants respective account balances. FMTC, in its role as Plan record keeper, has the responsibility for keeping track of the individual accounts.

42. As noted with the SIP, the assets of the TDS Plan are held in trust. Also, as with the SIP, in addition to being the record keeper, FMTC is the Trustee and Investment Manager for the TDS Plan. In addition, FMTC is a fiduciary with respect to certain TDS Plan investments.

43. As with the SIP, the selection of mutual funds made available in the TDS Plan are limited to funds operated, managed, and/or advised by Fidelity, with an exception for certain pre-existing investments and for the company stock fund.

44 Thus, as of approximately 2004, participating employees could invest TDS Plan contributions in any

of 26 investment options selected by Deere subject to the limitations imposed in an agreement with FMTC. Twenty-three of the available options are retail mutual funds operated and managed by FMRCo — the same mutual funds that FMRCo and its parent Fidelity Investments make available to investors large or small on the open market.

45. In addition to the retail mutual funds, the TDS Plan offers two funds managed directly by Fidelity, the "Blended Interest Fund" and the "Fidelity Intermediate Bond Commingled Pool." These two options are similar to mutual funds in that they pool money and invest in many different underlying securities. FMTC acts as the investment advisor to these two funds, choosing the amount of each security held. FMTC is a fiduciary with respect to these funds.

46. The TDS Plan also offers participants the option of investing in the Deere & Company Common Stock Fund, a fund that holds Deere & Company common stock. By the end of 2005, the TDS Plan had more than $500 million in assets. More than $244 million of those TDS Plan assets are held in Fidelity retail mutual funds.

Fiduciary Duties Owed To The Plan Under ERISA

47. ERISA §403(c)(1), 29 U.S.C §1103(c)(1), unambiguously mandates that:

> [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for

> the **exclusive purposes of providing benefits** to participants in the plan and their beneficiaries **and defraying reasonable expenses of administering the plan.**

(Emphasis added).

48. ERISA §§ 404(a)(1)(A)&(B) of ERISA, 29 U.S.C. § 1104(a)(l)(A) & (B), require that Plan fiduciaries, including the Defendants, "shall discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries" and:

a. [F]or the exclusive purpose of:

   i. providing benefits to participants and their beneficiaries; and

   ii defraying reasonable expenses of administering the plan, and

b. [W]ith the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Appendix A

49 ERISA § 405(a), 29 U.S.C. § 1105(a), provides that one fiduciary may be held liable for breaches of fiduciary duty committed by another fiduciary where

> (1) the fiduciary "participates knowingly in or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach";
>
> (2) the fiduciary, by his or her "failure to comply with section 1104(a) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary" enables "such other fiduciary to commit such a breach"; or
>
> (3) the fiduciary "has knowledge of a breach by such other fiduciary," and does not make "reasonable efforts under the circumstances to remedy the breach."

50 ERISA § 406, 29 U.S.C. § 1106, prohibits certain transactions between a plan and "parties in interest." This section provides that unless subject to an exemption as set forth in ERISA § 408, 29 U.S.C § 1108, a fiduciary

> shall not cause the plan to engage in a transaction . . . if he knows or should know that such a transaction constitutes a direct or indirect — sale or exchange, or leasing, of any property between the plan and a party in

> interest . . . furnishing of goods, services or facilities between the plan and a party in interest . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1).

51. For purposes of section 406, a "party in interest" is any plan fiduciary, including the plan administrator, trustee, officer or custodian, any plan services provider, the employer, a relative of any of the above, and certain persons with ownership or leadership roles in any of the above. ERISA § 3(14), 29 U.S.C. § 1002(14).

52. Similarly, a fiduciary such as Deere or Fidelity (1) shall not "deal with the assets of the plan in his own interest or for his own account"; (2) shall not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan" or its participants and beneficiaries; and (3) shall not "receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U S C. § 1106(b).

53. ERISA §104(b)(1), 29 U.S.C. § 1024(b)(1), requires that Deere, as the Plan Administrator, periodically provide to Plan participants and beneficiaries a summary plan description (an "SPD").

54. ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3), requires that Deere, as the Plan Administrator, at least annually provide to Plan participants and beneficiaries copies of statements and schedules from the Plans' annual report for the previous year, and such additional information "as is necessary to fairly summarize the latest annual report."

55. The schedules and statements that Deere, as the Plan Administrator, annually must provide to Plan participants and beneficiaries specifically include:

> a. [A] statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan; and
>
> b. [A] statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications.

See ERISA §103(b)(3), 29 U S.C. §1023(b)(3)

56. ERISA §104(b)(4), 29 U S C § 1024(b)(4), entitles Plan participants and beneficiaries to receive more detailed information from Deere, as the Plan Administrator, on request:

> The administrator shall, upon written request of any participant or beneficiary, furnish a

> copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

57. ERISA §103(b)(2)&(3), 29 U.S.C. § 1023(b)(2) &(3) mandates that, among other extensive disclosures, Deere, as a Plan fiduciary, must include in a Plan's "Annual Report"

> a statement of [the Plan's] assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application

58. ERISA § 404(c) provides to Plan fiduciaries a "Safe Harbor" from liability for losses that a participant suffers in his or her 401(k) accounts to the extent that the participant exercises control over the assets in his or her 401(k) accounts. To be eligible for the protection of this "safe harbor," Deere, as a Plan fiduciary, must, among other things, have provided:

> a an opportunity for a participant or beneficiary to exercise control over assets in his individual account, and
>
> b. a participant or beneficiary an opportunity to choose, from a broad range of investment alternatives, the manner in which some or all of the assets in his account are invested

29 C F.R §2550.404c-1(b)(1).

59. For a participant or beneficiary to have "an opportunity to exercise control over assets in his individual account," Plan fiduciaries must provide him or her with "the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives under the Plan." 29 C.F.R. §2550.404c-1(b)(2)(B).

60 The "sufficient investment information" that Deere, as a Plan fiduciary, must have provided includes:

> A description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e.g., commissions, sales load, deferred sales charges, redemption or exchange fees).

29 C.F.R. §2550.404c-l(b)(2)(i)(B)*(1)(v)*. At least upon request, it must include

> A description of the annual operating expenses of each designated investment alternative (e.g., investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries, and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative

29 C.F.R. §2550 404c-1(b)(2)(i)(B)*(2)(i)*.

61. ERISA's Safe Harbor Regulations state that the imposition of *reasonable* charges for *reasonable* Plan expenses does not interfere with a participant's opportunity to exercise control over his or her individual account so long as *Plan fiduciaries inform the participant* of such actual expenses:

> A plan may charge participants' and beneficiaries' accounts for the reasonable expenses of carrying out investment instructions, *provided that procedures are established under the plan to periodically inform such participants and beneficiaries of actual expenses incurred with respect to their respective individual accounts.*

29 C.F.R. §2550 404c-1(b)(2)(ii)(A) (emphasis added).

The Fees and Expenses Assessed Against The Plans

62. Defendant Deere, directly or indirectly, has caused the Plans to purchase services from various plan service providers, including trustee, record-keeping, administration, investment advisory, investment management, brokerage, insurance, consulting, accounting, legal, printing, mailing, and other services.

63. Plan service providers, such as Fidelity, receive payment in at least one of two ways:

a. By direct disbursement from the Plan, and/or

b. By receiving, or having the opportunity to receive, "Revenue Sharing" payments comprised of Plan assets distributed between and/or among various service providers.

"Hard Dollar" Payments to Plan Service Providers

64. Payments in the form of direct disbursements from a 401(k) plan to participants or an entity providing a service to the plan are characterized as "Hard Dollar" payments.

65. 401(k) plans must disclose to government regulators and plan participants, in one form or another, Hard Dollar payments made from the plan to service providers.

66 The Plans have stated in filings with the government regulators that the Plans pay no administrative expenses. Upon further inquiry by participants, the Plans stated that Deere, as Plan Sponsor, pays all of the expenses of the Plans in accordance with the Plan documents.

67 Whether or not this is correct with respect to Hard Dollar expenses, these Hard Dollar expenses are not all of the fees that Fidelity charges or collects in exchange for the services it provides to the Plans

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Revenue Sharing Payments to Plan Service Providers

68. Revenue Sharing is a common practice in the financial, securities, and investment industry that provides services to 401(k) plans.

69. Industry commentators and analysts consider Revenue Sharing to be the "big secret of the retirement industry."

70. Industry commentators and analysts generally define "Revenue Sharing" as the transfer of asset-based compensation from brokers or investment management providers (such as the mutual funds advised and managed by FMRCo, and also common or collective trusts, insurance companies offering GICs, and similar pooled investment vehicles) to administrative service providers (such as FMTC in its role as record-keeper and trustee, as well as administrators and/or consultants) in connection with 401(k) and other types of defined contribution plans.

71. For example, a plan or its agent (a third-party administrator, consultant, or similar fiduciary) seeking to select an investment vehicle (mutual fund, common or collective trust, guaranteed investment contracts, etc. (collectively "Fund")) to be offered to plan participants as an investment option will negotiate an agreement that sets the costs assessed against each dollar invested by specifying the expense ratio and available Revenue Sharing.

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72 In Revenue Sharing arrangements, the plan and the Fund agree upon an asset-based fee that is not the true price for which the Fund will provide its service.

73. Instead, the Fund's agreed asset-based fee includes ***both*** the actual price for which the Fund will provide its service ***and*** additional amounts that the Fund does not need to cover the cost of its services and to make a profit.

74. The additional portion of the agreed-upon asset-based charge is "shared" with plan service providers or others who do business with the plan or the Fund.

75 As a result of Revenue Sharing arrangements, plan service providers, such as Fidelity, or others who do business with the plan or the Fund receive *both* a Hard Dollar payment from the plan *and* additional revenue that the Fund "shares" with them.

76 The total fees a Fund charges to a plan can vary widely based upon a number of factors, including without limitation the amount invested; the level of sophistication of the plan fiduciary negotiating the fee agreement; the plan fiduciary's awareness of Revenue Sharing and inclination to expend effort monitoring Revenue Sharing transfers; the diligence with which the plan's representative conducts such negotiations; and the separate financial interests and/or agendas of the plan fiduciary and the Fund as they negotiate

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77. Revenue Sharing also occurs between and among brokerage firms, investment managers, fund families and other service providers.

78. When 401(k) plan service providers receive compensation in the form of both Hard Dollar fees *and* Revenue Sharing payments, determining the total amount of fees and expenses that the plan incurs for any category of services (*i.e.* recordkeeping and administration, investment advisory, trustee, auditing, and accounting, etc.) requires that *both* the Hard Dollar fees *and* Revenue Sharing payments be taken into account.

79. Ascertaining whether the Plan Administrator — in this case Deere —has fulfilled its fiduciary obligation to ensure that the fees and expenses assessed against the 401(k) plan are reasonable and incurred solely in the interest of plan participants requires consideration whether the *total of both* the Hard Dollar *and* Revenue Sharing payments paid for any category of services complies with this standard.

80 It is especially important to consider the Revenue Sharing payments because they are based on the total assets under management, rather than on the number of participant accounts serviced Thus, as the years pass, and the participants' retirement savings grow, the amount of money available for Revenue Sharing payments increases, even though no additional services may be provided to the plan

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81. Although Revenue Sharing monies arise only as a result of, and in connection with, transactions involving the plan, plan assets and plan service providers; Revenue Sharing is not always captured and used for the benefit of the plan and the participants.

82. When Revenue Sharing is foregone, the plan will not only pay additional Hard Dollar fees to the plan service providers (since no Revenue Sharing payments are available to offset those Hard Dollar costs), but it will also pay additional money to the Fund, beyond what the Fund would normally charge and keep.

83. Consequently, in determining whether a plan administrator or other fiduciary has fulfilled its obligation to ensure that the fees and expenses assessed against the plan are reasonable and incurred solely in the interest of plan participants, foregone Revenue Sharing must also be taken into account.

84. Such is the case here. The Plans and the participants and beneficiaries of the Plans have been charged fees and expenses that include monies with which to make Revenue Sharing payments. In many cases, the amounts allocated for Revenue Sharing payments are more than 1/3 of the total amount collected by Fidelity and its affiliates that operate the mutual funds.

85. In this case, these Revenue Sharing amounts were retained by Fidelity and its affiliates as fees for their services. The Revenue Sharing payments kept by

Fidelity and its affiliates are in addition to any Hard Dollar Fees paid directly to them by the Plans or by Deere.

86. These Revenue Sharing amounts are in excess of the fees that Fidelity would retain if non-affiliated plan service providers were involved. Fidelity was able to retain these additional payments because the Plans employ FMTC as both recordkeeper and trustee and because it uses investment options advised and managed by FMRCo and operated by other Fidelity affiliates.

87. These Revenue Sharing payments — consisting of millions of dollars — were far in excess of reasonable fees for the administrative and/or investment services provided to the Plans by the Fidelity affiliates and far in excess of what plans of this type must pay for similar services or investment options

Revenue Sharing Arrangements Are Not Disclosed to Plan Participants

88. Revenue Sharing is not disclosed to Plan participants and government regulators, even though it accounts for a greater portion of service provider payments than do hard Dollar disbursements to those same providers.

89. Accordingly, industry commentators and experts have dubbed Revenue Sharing payments to be "hidden fees" that are assessed against 401(k) plans and thus reduce plan participants' retirement savings.

90. By entering into agreements with FMTC, FMRCo and other Fidelity affiliates, and by allowing, and/or failing to monitor, discover, and prevent or recover these undisclosed Revenue Sharing arrangements, Deere deprived Plan participants of true and accurate information regarding:

a. How much they are paying in fees and expenses for each Plan;

b. Who is receiving Plan assets through Revenue Sharing;

c. How much specific service providers are paid by the Plans; and

d. Whether the total amount paid to services providers (*i e.* disclosed, hard dollar fees *combined with* Revenue Sharing payments) is reasonable and incurred solely for the participants' benefit.

Defendants' Non-Compliance with §404(c)'s Safe Harbor Requirements and Concealment of Its Fiduciary Breaches

91. Neither Deere nor Fidelity disclosed, and to this day have not disclosed, the fact that Fidelity and/or other plan service providers were engaging in Revenue Sharing. They did not disclose that Revenue Sharing was available for the benefit of the Plans and the participants, and they did not disclose the amount of Revenue Sharing payments, made by or to Plan service providers.

92. In fact, Deere stated exactly the opposite when asked.

93. Plan participants did not have, and do not have, complete and actual knowledge of the fees and expenses being charged to the Plans that reduced their account balances.

94. Thus, the Plans' fiduciaries, including Defendants, have not told Plan participants, and Plan participants do not know:

a. the "annual operating expenses" of the investment options in the Plans, as required by 29 C.F.R §2550.404c-1(b)(2)(i)(B)*(2)(i)*; and

b. the actual expenses incurred with respect to their respective individual accounts, as required by 29 C.F.R. §2550.404c-1(b)(2)(ii)(A).

95. As a result of Defendants' failure and refusal to provide accurate information, and the general failure on the part of either Deere or Fidelity to disclose the actual Plans' expenses, and the specific amounts paid to specific service providers, including the available Revenue Sharing and the fact that Deere and Fidelity have long-standing agreements that Deere will only choose Fidelity-related funds for the Plans, the participants have not been provided with "the opportunity to obtain sufficient information to make

informed decisions with regard to investment alternatives under the plan." 29 C.F.R. §2550.404c-1(b)(2)(1)(B).

96 Because none of the Defendants has provided the participants with this information, and because the Defendants concealed this information from them, the participants have lacked the information necessary to understand and protect their interests in the Plans and/or to have knowledge of, these Defendants' breaches of fiduciary duty.

97. In fact, in their fiduciary roles, Deere and Fidelity are the parties with the information necessary to know and understand whether the participants' rights and protections under ERISA are being, or have been, violated.

98 Defendants have an affirmative obligation to provide full and accurate information to Plan participants regarding the administration of the Plans.

99. Their silence and/or non-disclosure in the face of such a duty to disclose is tantamount to an affirmative misrepresentation

100. Here, despite the duty to disclose full and accurate information regarding the fees and expenses assessed against participants' accounts, on an ongoing basis these Defendants failed and refused to disclose to, and inform the participants of·

a. the total amount of fees and expenses reasonable and necessary to operate the Plans;

b. the total amount of amount of fees and expenses the Plans actually paid to service providers;

c. the availability of Revenue Sharing;

d. the true and accurate details regarding the revenues and expenses of the Plans;

e. the true and accurate operating expenses which reduce participants' returns, including both Hard Dollar payments and Revenue Sharing, for each of the Plans' investment alternatives;

f. the true and accurate transaction fees and expenses which affect the participants' account in connection with the purchase or sale of investment alternatives,

g the amount, when both Hard Dollar Payments and Revenue Sharing are considered, by which the Plans' expenses exceeded those which were reasonable and incurred solely in participants' interests;

h. other revenue and expense information necessary for the participants to understand and protect their interests in the Plans; and,

i the Defendants' agreement to limit the Plans' investment options to Fidelity affiliated funds, thereby benefiting Fidelity and/or other Fidelity affiliates.

101. Based upon the foregoing, the Defendants are not entitled to the safe harbor protections of ERISA § 404(c).

102. Based upon the foregoing, the statue of limitations was tolled on the breaches set forth in this Complaint and did not begin to run until such time as Plaintiffs actually discovered them.

COUNT I:
Breach of Fiduciary Duty Against Defendants Deere, FMTC and FMRCo
ERISA §502(a)(2)

103. Plaintiffs restate and incorporate the allegations contained in paragraphs 1 through 102 as though fully set forth here.

104. As set forth in detail above, Defendants owe the Plans, the participants and beneficiaries, and the Classes extensive fiduciary duties including, without limitation:

a. To conduct themselves as Plan fiduciaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent ERISA professional fiduciary

would in operating and administering a 401(k) plan the size and character of the Plans;

b. To perform their duties as fiduciaries with the utmost loyalty and fidelity to the Plans and the participants and beneficiaries, avoiding at all times conflicts of interest, self-interest, and duplicity,

c. To ensure, at all times, that Plan assets "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan;"

d. To track and account for all transactions involving the Plans and the Plans' assets so as to ensure that the Plans' assets are retained, managed, and disbursed in compliance with the Plans' Documents and ERISA;

e To track and account for all transactions involving the Plans and the Plans' assets so as to ensure that the Plans' assets "never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying

reasonable expenses of administering the Plan;"

f. To ensure that the fees and expenses incurred by the Plans are reasonable and incurred for the sole and exclusive benefit of Plan participants and beneficiaries;

g. In entering into agreements with service providers to the Plans, or in Fidelity's ease, in entering into agreements with Deere, to ensure that the payments from the Plans — whether they are direct or indirect — are reasonable for the services provided and made for the sole and exclusive benefit of the Plans' participants and beneficiaries;

h. In operating and administering the Plans, to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plans were reasonable and incurred solely for the benefit of the Plans' participants,

i In operating, managing, advising, and administering the Plans, on an ongoing basis to monitor the payments made by the Plans to service providers, advisors, and/or managers such as Fidelity — whether they are direct or indirect — are and remain reasonable for the services provided and

made for the sole and exclusive benefit of the Plans' participants and beneficiaries;

j. To inform themselves of, and understand, the various methods by which vendors in the 401(k) industry, including Fidelity and other Fidelity affiliates, collect payments and other revenues from 401(k) plans;

k. To inform themselves of trends, developments, practices, and policies in the retirement, financial investment and securities industry which affect the Plans; and to remain aware and knowledgeable of such trends, practices and policies on an ongoing basis;

l. To communicate with Plan participants and beneficiaries regarding the Plans honestly, clearly and accurately;

m. To affirmatively and without request provide Plan participants and beneficiaries with honest, accurate and complete information they need to understand their investments in the Plans; the management, risk, potential returns of such investments, and the fees and expenses incurred in connection with those investments;

n. Upon request, to provide further any information to Plan participants and

beneficiaries regarding the operation and administration of the Plans and the expenses incurred in doing so; and

o. To provide honest, accurate and complete information to Plan participants and beneficiaries regarding the costs associated with their various investment choices and directions.

105. As set forth in detail above, Deere and/or Fidelity breached their fiduciary obligations to the Plans, the Plans' participants and beneficiaries and the Classes by, among other conduct to be proven at trial, one or more of the following acts.

a. Agreeing that the Plans would pay — directly or indirectly — fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of the Plans' participants and beneficiaries;

b. Allowing or causing the Plans to pay — directly on indirectly — fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of the Plans' participants and beneficiaries,

c. Failing to monitor the fees and expenses paid by the Plans and, by such failure, causing and/or allowing the Plans to pay fees and expenses that were, or are,

unreasonable and/or not incurred solely for the benefit of the Plans' participants and beneficiaries;

d. Failing to inform itself of trends, developments, practices, and policies in the retirement, financial investment and securities industry which affect the Plans; and failing to remain aware and knowledgeable of such trends, practices and policies on an ongoing basis;

e. Failing to inform itself of, and understand, the various methods by which vendors in the 401(k) industry collect payments and other revenues from 401(k) plans;

f. Failing to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plans were reasonable and incurred solely for the benefit of the Plans' participants;

g. Failing to communicate with Plan participants and beneficiaries regarding each Plan honestly, clearly and accurately;

h. Failing properly to inform and/or disclose to Plan participants the fees and expenses that are, or have been, paid by the Plans;

i. Failing to inform and/or disclose to Plan participants in proper detail and clarity the transactions, fees and expenses which affect participants' accounts balances in connection with the purchase or sale of interests in investment alternatives;

j. Failing to discover, disclose and stop the charging of hidden and excessive fees to the Plans;

k. By the foregoing conduct, failing to exercise the care, skill, prudence and diligence that a prudent person would when acting in like capacity and familiar with such matters.

106. As set forth in detail above, as a result of these breaches, Plaintiffs, the Classes, the Plans; and the Plans' participants and beneficiaries have suffered financial losses and damages.

107. Further, as set forth in detail above, the Defendants failed to provide participants and beneficiaries with sufficient investment information to qualify for the Safe Harbor immunity of ERISA § 404(c), 29 U.S.C. § 1104(c) Accordingly, the Defendants are not able to make use of this section to avoid liability for any investment losses participants and beneficiaries may have experienced in the Plans caused by the above-referenced breaches

108. Pursuant to ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502(a), the Defendants are liable to restore to the Plans the losses experienced as a direct result of the Defendants' breaches of fiduciary duty and are liable for any other available and appropriate equitable relief, including prospective injunctive relief and declaratory relief, and attorney's fees

COUNT II:
Other Remedies for Breach of Fiduciary Duty Against Deere, FMTC and FMRCo — ERISA §502(a)(3)

109. Plaintiffs restate and incorporate the allegations contained in paragraphs 1 through 108 as though fully set forth here.

110. As an alternative to the causes of action stated in Count I, Plaintiffs seek further relief pursuant to ERISA § 502(a)(3), 29 U.S.C., § 1132(a)(3).

111. Under section 502(a)(3), a participant may enjoin any act which violates ERISA or may obtain other appropriate equitable relief to redress such violations or enforce the terms of ERISA.

112. Defendants are the primary fiduciaries of the Plans and occupy a position of trust and confidence in connection with the Plans, the Plans' assets, and the Plans' participants and beneficiaries.

113. These Defendants have exclusive discretion and control over the Plans' assets and are strictly obligated to exercise that control "for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan."

114. Although *only* Plan participants and beneficiaries are entitled to Plan assets and to the benefit of Plan assets, in the absence of full and candid disclosure from the Defendants, Plan participants and beneficiaries do not know, and have no means of knowing, how their assets have been managed and disbursed.

115. Accordingly, these Defendants occupy the position of a common law trustee in connection with the Plans, the assets of the Plans, and the participants and beneficiaries of the Plans.

116. As set forth in detail above, these Defendants have caused and/or allowed the Plans to pay — directly or indirectly — excess fees and expenses to Plan service providers.

117. These Defendants, and not the Plaintiffs, are the entities which have and/or should have specific and detailed information regarding how Plan assets have been treated and disbursed in this regard.

118. Accordingly, the Court should order that these Defendants render an accounting of all transactions,

disbursements and dispositions occurring in, in connection with, and/or in respect of, the Plans and the assets of the Plans.

119. The Plaintiffs respectfully request that the Court order that such an accounting include, without limitation, detailed and specific information regarding all fees and expenses incurred by the Plans and/or paid to third parties, whether paid directly by the Plans or indirectly transferred among Plan service providers or other third parties.

120. Plaintiffs respectfully request that to the extent these Defendants do not or cannot account for all such transactions and their property under ERISA, Plan documents and other applicable law, the Court surcharge against these Defendants and in favor of the Plans all amounts for which they cannot account.

121. Plaintiffs further seek injunctive and other appropriate equitable relief to redress the wrongs described above, and to cause them to cease in order for the Plans' participants and beneficiaries to receive the full benefit of their retirement savings in the future.

COUNT III:
Other Remedies for Breach of Fiduciary Duty
Against FMTC and FMRCo
ERISA §502(a)(3)

122. Plaintiffs restate and incorporate the allegations contained in paragraphs 1 through 121 as though fully set forth here.

123. As a further alternative to the causes of action stated in Count 1, Plaintiffs seek further relief against Defendants FMTC and FMRCo pursuant to ERISA § 502(a)(3), 29 U.S.C , § 1132(a)(3).

124. One form of equitable relief available under section 503(a)(3) is equitable restitution.

125. By secretly charging the Plans for and retaining the Revenue Sharing payments described above, Defendants FMTC and FMRCo obtained funds that should have been used solely for the benefit of Plans' participants and beneficiaries for the exclusive purposes of providing benefits to participants in the Plans and their beneficiaries and defraying reasonable expenses of administering the Plans.

126. FMTC and FMRCo knew or should have known that those Revenue Sharing payments were the Plans' assets and that they should have been used solely for the benefit of the Plans' participants and beneficiaries for the exclusive purposes of providing benefits to participants in the Plans and their beneficiaries and defraying reasonable expenses of administering the Plans.

127. Because the Revenue Sharing payments were used for purposes not permitted by ERISA, these monies rightfully and in good conscience belong to the Plans, and the participants and beneficiaries of the Plans.

128. The Revenue Sharing payments are specifically identifiable funds

129. The Revenue Sharing payments are in the possession, control, and/or custody of FMTC or FMRCo.

130 Plaintiffs, on behalf of the Plans, seek equitable restitution of the Revenue Sharing payments, along with any profit, from FMTC and/or FMRCo.

WHEREFORE Plaintiffs, on behalf of the Plans and all similarly situated participants and beneficiaries of the Plans, respectfully request that the court:

- find and declare that the Defendants have breached their fiduciary duties as described above;

- order the Defendants to make good to the Plans all losses that the Plans incurred as a result of the conduct described above and to restore the Plans to the position they would have been in but for the breaches of fiduciary duty;

- impose a constructive trust on any monies by which the Defendants were unjustly enriched as a result of their breaches of fiduciary duty and/or cause the Defendants to disgorge such monies and return them to the Plans;

- remove any fiduciary who has breached his or her fiduciary duties and/or enjoin the fiduciary from future breaches of ERISA;

- award actual damages to the Plans in the amount of its monetary losses;

- require Defendants to render an accounting as set forth above;

- surcharge against Defendants and in favor of the Plans all amounts involved in transaction which such accounting reveals were or are improper, excessive and/or in violation of ERISA;

- permanently enjoin Defendants from breaching their fiduciary duties in each respect set forth in the Complaint;

- order costs and attorneys fees pursuant to ERISA § 502(g) and the common fund doctrine,

- order equitable restitution or other available equitable relief against the Defendants;

- order the payment of interest to the extent it is allowed by law; and grant any other and further relief the Court deems appropriate

PLAINTIFFS DEMAND A TRIAL BY JURY OF ALL COUNTS SO TRIABLE.

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Respectfully submitted,

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APPENDIX B — RELEVANT STATUTE, EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, § 409, 29 U.S.C. § 1109

29 U.S.C.A. § 1109

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary